

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DERRICKUS LYDELL GREEN,

Defendant-Appellant.

UNPUBLISHED

October 2, 2003

No. 236045

Muskegon Circuit Court

LC No. 00-044735-FC

Before: Cooper, P.J., and Fitzgerald and Kelly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a), carrying a concealed weapon, MCL 750.227, felon in possession of a firearm, MCL 750.224f, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced him as a second habitual offender, MCL 769.10, to concurrent terms of life imprisonment for the first-degree murder conviction and forty-seven months to 7-1/2 years' imprisonment for the CCW and felon in possession convictions, to be served consecutive to two concurrent two-year terms for the felony-firearm convictions. He appeals as of right. We affirm.

I. Sufficiency of the Evidence

Defendant argues that the evidence was insufficient to establish the premeditation and deliberation elements of first-degree murder. We disagree. "The test for determining the sufficiency of the evidence in a criminal case is whether the evidence, viewed in a light most favorable to the people, would warrant a reasonable juror in finding guilt beyond a reasonable doubt." *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000).

Even if we were to credit defendant's argument that the evidence did not support a reasonable inference that he made the statement, "I'm going to pop a cap in his a--,"¹ the

¹ We decline to address defendant's isolated suggestion that the prosecutor's closing argument concerning this evidence amounted to misconduct. This question is not properly before us because it is not set forth in defendant's statement of the question presented, nor is it briefed with citation to supporting authority. MCR 7.212(C)(5); *People v Kelly*, 231 Mich App 627, 640-641;

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circumstances surrounding the shooting and defendant's conduct both before and after the shooting were sufficient to enable a rational trier of fact to find beyond a reasonable doubt that defendant killed the victim with premeditation and deliberation. *People v Ortiz*, 249 Mich App 297, 301; 642 NW2d 417 (2001); *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998). Viewed in a light most favorable to the prosecution, the evidence did not suggest a physical fight or the type of sudden affray that would give rise to impulsive conduct. *Plummer, supra* at 301. A rational factfinder could find beyond a reasonable doubt that defendant, the only person who was armed with a gun, had an opportunity to subject the nature of his response to a second look before he shot the victim in the face. *Id.* The evidence was sufficient to establish a premeditated and deliberate killing by defendant.

II. Ineffective Assistance of Counsel

Next, defendant presents several claims of ineffective assistance of counsel. In general, a claim of ineffective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Because defendant did not raise this issue in an appropriate motion in the trial court, our review is limited to mistakes apparent from the record. *People v Riley*, 468 Mich 135, 139; 659 NW2d 611 (2003). We conclude that defendant has not established the requisite deficient performance and prejudice to warrant appellate relief. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

A. Failure to Investigate the Case/Prepare for Trial

It is not apparent from the record that defense counsel failed to properly investigate the case. There is also no basis in the record for concluding that defense counsel's failure to call witnesses deprived defendant of a substantial defense. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Defendant's right to testify in his own defense can be deemed waived because he did not elect to testify. *People v Simmons*, 140 Mich App 681, 685; 364 NW2d 783 (1985). There is no indication in the record that defense counsel improperly refused to allow defendant to testify. Defendant has not overcome the presumption that his failure to testify, or the failure to call other witnesses, can be attributed to sound trial strategy. *Toma, supra*; *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

B. Choice of Defense

Defense counsel was not ineffective for resorting to a misidentification defense, rather than a defense focused on the requisite state of mind for murder. With a choice between weak defenses, selecting the weak defense that offered the possibility of a complete acquittal was not unsound. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." *Strickland v Washington*, 466 US 668, 691; 104 S Ct 2052; 80 L Ed 2d 674 (1984). At the sentencing hearing, defense counsel remarked, "The bottom line is he has been stating all along that he was

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588 NW2d 480 (1998); *People v Yarger*, 193 Mich App 532, 540 n 3; 485 NW2d 119 (1992).

not the shooter.” Accordingly, based on the existing record, defense counsel’s decision to pursue a misidentification defense cannot be characterized as unsound. A failed strategy does not constitute ineffective assistance of counsel. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

Nor are we persuaded that an instruction on voluntary manslaughter would have been warranted, if requested. *People v Pouncey*, 437 Mich 382, 391; 471 NW2d 346 (1991). Defense counsel was not required to make a frivolous or meritless request for a jury instruction. *Riley*, *supra* at 142.

C. Felon in Possession Charge

Defense counsel was not ineffective in his handling of the felon in possession charge. Because the felon in possession charge arose out of the same transaction as the murder charge, it was not reasonably probable that a motion for severance would have succeeded. See MCR 6.120(C); *People v Green*, 228 Mich App 684, 691-692; 580 NW2d 444 (1998); *People v Mayfield*, 221 Mich App 656, 659-660; 562 NW2d 272 (1997). Further, defense counsel’s stipulation to the admission of a judgment of sentence identifying defendant’s prior drug offense conviction did not fall below an objective standard of reasonableness. Although such disclosure may carry a risk of prejudice, *People v Swint*, 225 Mich App 353, 378; 572 NW2d 666 (1997), nondisclosure likewise could carry a risk that the jury would speculate about its nature. A defense counsel’s decision to introduce evidence of bad acts can sometimes be a legitimate trial tactic. *People v Thomas*, 126 Mich App 611, 626; 337 NW2d 598 (1983).

Additionally, we find no merit to defendant’s argument that this alleged error was compounded by defendant’s parole officer’s testimony about the prior conviction. Other than the nature of the offense, the parole officer did not reveal details about the prior conviction. Further, defense counsel’s unsuccessful motion in limine to exclude the parole officer’s testimony belies defendant’s claim that defense counsel did not try to limit evidence about the prior conviction. We find no basis for finding ineffective assistance of counsel relative to the parole officer’s testimony.

Even if defense counsel’s conduct in this regard could be considered deficient, we would not reverse because defendant has not shown a reasonable probability that, but for these alleged errors, the outcome of the trial would have been different. The evidence that defendant committed the charged offenses was overwhelming, notwithstanding some inconsistencies in the proofs.

D. Eyewitness Credibility

We also hold that defendant has not overcome the presumption that defense counsel engaged in sound strategy by challenging the credibility of eyewitness Natasia Beasley’s based on her delay in reporting what she saw to the police. *In re Ayres*, 239 Mich App 8, 23; 608 NW2d 132 (1999). Beasley testified that she did not go to the police immediately because she did not want to get involved. But when she did report what she saw, two men came to her home and threatened her with guns. Defendant has not demonstrated the requisite deficient performance and prejudice to succeed on a claim of ineffective assistance of counsel relative to Beasley’s testimony about the threats.

E. Photographs of Victim

Defense counsel was not ineffective for failing to object to photographs of the victim's gunshot wounds to the head. The photographs were probative of whether the victim was shot in the front or back of the head, which was a factual issue at trial. It is apparent from the record that a defense objection to the photographs would not have succeeded. See *People v Mills*, 450 Mich 61; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). Defense counsel was not required to make futile objections to the evidence. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002).

F. Juror Disqualification

Finally, defense counsel was not ineffective for failing to properly handle information that a juror observed two trial witnesses near her residence. The investigation of this matter at trial revealed that it did not affect the juror's ability to decide the case. The record does not disclose a basis for excusing the juror. *People v Budzyn*, 456 Mich 77, 88-89; 566 NW2d 229 (1997); *People v Daoust*, 228 Mich App 1, 9; 577 NW2d 179 (1998). Furthermore, as a matter of trial strategy, defense counsel expressly declined the trial court's offer to give a cautionary instruction or to question other jurors about this matter. We can discern no reasonable probability in the record for concluding that further action would have resulted in the removal of any juror. Defendant has not demonstrated that defense counsel's decision to decline further action that would have highlighted the matter was objectively unreasonable.

Affirmed.

/s/ Jessica R. Cooper
/s/ E. Thomas Fitzgerald
/s/ Kirsten Frank Kelly